(ORDER LIST 17 U.S.)

MONDAY, AUGUST 26, 2024

CERTIORARI -- SUMMARY DISPOSITION

17-06 UNITED STATES V. JACKFRUITISM

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States District Court for the District of Columbia in light of the incomplete nature of the record on appeal.

ORDERS IN PENDING CASES

17A02 (17-07) IN RE GIORDANO, TONY (GIORDANO, TONY V. UNITED STATES SENATE)

The application for an injunction is denied. Justice St Helier filed a statement respecting the denial of the injunction. Justice Barrett took no part in the consideration or decision of this application.

17A03 (17-08) IN RE GOBIES, GRANDPA ET AL.

The application presented to Justice Barrett is referred to Justice Harlan following the resignation of Justice Barrett and by him referred to the Court. Blanket leave to file briefs of *amicus curiae* is granted.

17D5 IN RE A COMPLAINT OF JUDICIAL MISCONDUCT AGAINST JUSTICE ARTIST

The suspension of Justice Artist is vacated, and United States District Judge Rummy Leroux is appointed as special master to conduct appropriate enquiry into

the charges of judicial misconduct against Justice Artist, to fix the time and conditions of the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit reports as he may deem appropriate. Justice St Helier filed an opinion concurring in the vacatur and the appointment of a special master.

17D3 **IN RE A COMPLAINT OF JUDICIAL MISCONDUCT AGAINST JUDGE DEROGATORYY**

Complainee is ordered to file an answer to the charge of judicial misconduct within seven days of this Order or alternatively to show cause why he should not be subject to discipline. The Clerk is directed to serve notice of this order upon Complainee.

17D4 **IN RE A COMPLAINT OF JUDICIAL MISCONDUCT AGAINST JUDGE LIKEABLEDALTON2000**

Complainee is ordered to file an answer to the charge of judicial misconduct within seven days of this Order or alternatively to show cause why he should not be subject to discipline. The Clerk is directed to serve notice of this order upon Complainee.

PETITIONS -- DENIED

17-05 **IN RE ARRIGHI**

The petition for a writ of anytime review is denied. Justice St Helier filed a statement, in which Justice Harlan joined, respecting the denial of anytime review.

17-07 **IN RE GIORDANO, TONY (GIORDANO, TONY V. UNITED STATES SENATE)**

The petition for a writ of mandamus is denied. Justice St Helier filed a statement respecting the denial of mandamus. Justice Barrett took no part in the consideration or decision of this petition.

JUDICIAL COMPLAINTS

17D6 **IN RE A CHARGE OF JUDICIAL MISCONDUCT AGAINST JUDGE AKACOOLGUYGPT**

Leave to file a charge of judicial misconduct is granted. Complainant is ordered to file an answer to the charge of misconduct within seven days of this Order.

SUPREME COURT OF THE UNITED STATES

No. 17-05

IN RE ARRIGHI

ON PETITION FOR A WRIT OF ANYTIME REVIEW

[August 26 2024]

The petition for a writ of anytime review is denied.

Statement of JUSTICE ST HELIER, with whom JUSTICE HARLAN joins, respecting the denial of anytime review.

"This Court is a court of final review and not first view." *City of Austin, Tex.* v. *Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1476 (2022) (cleaned up). This Court, like other appellate tribunals, is not equipped to conduct factual review. "In our adversarial system, appellate courts depend in significant measure on the parties and district court to sharpen and test arguments for their soundness and strength." *Hanson* v. *Wyatt*, 552 F.3d 1148, 1174 (CA10 2008) (GORSUCH, J., dissenting). Courts below offer appellate courts the benefit of well-identified questions, affords the parties an opportunity to hone their arguments, and, to put the bar at the very lowest, to understand what they even are litigating about.

Petitioner at bar would ask us to review the constitutionality of a piece of legislation at large because, as far as one can tell from the petition, he believes that legislation conferring powers to search members of the public that approach certain sensitive, protected, persons is unconstitutional.

A party who invokes this Court's original jurisdiction bears the hefty burden of showing not only the justiciability of his question, but, furthermore, that this this Court should as a prudential matter exercise its extraordinary discretion in exercising original jurisdiction, something we are reluctant to do unless "its necessity [is] absolute." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)). Anytime review is, in other words almost never appropriate, and should only be so much as contemplated where, in addition to a matter being fit generally for judicial consideration, recourse is as practical matter impossible before an ordinary trial court at the first instance. Moreover, even when that demanding standard is met, anytime review is still improvident to my mind unless the petitioner is able to bring before us useful questions of law of a specificity and importance largely on a par with those raised in the course of our ordinary appellate role.

The absence of a meaningful record in this fact-sensitive litigation is not the only reason that counsels against the grant of review. Courts exist "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009). In line with a deep "concern about the proper — and properly limited — role of the courts in a democratic society," *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)), and out of a desire to avoid the abusive instrumentalisation of the judicial process, we have previously explained that "courts have no charter to review and revise legislative and executive action" outside of its traditionally adjudicative role. *Summers*, at 492. It follows that "[i]n order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or 'personal stake,' in the outcome of the action." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 71 (2013) (citing *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011)). Petitioner, meanwhile, clearly does not. Petitioner describes himself as a "Crime Boss" whose interests will be harmed because the challenged legislation will prevent him from "stand[ing] within protective zones to get a good angle on President Teasoups." Pet. for Anyt. Rev. 6. This kind of "interest" in challenging governmental decisions is precisely what our justiciability jurisprudence is designed to address. There can be legitimate debate as to what constitutes a legally cognisable interest, or whether our justiciability jurisprudence is unduly cumbersome, but there can be no debate that Petitioner does not meet even the lowest possible bar. The ability to commit organised crime is not a legally cognisable interest. The complaint that "the slaughter of President Teasoups at the hands of Aurora Killers patriots," Pet. for Anyt. Rev. 8, will be made slightly more difficult by legislation designed to protect high-profile Americans from being subjected to attacks by violent criminals does not, of itself, invoke a legitimate interest which is deserving of or appropriate for judicial consideration.

SUPREME COURT OF THE UNITED STATES

No. 17D5

IN RE ACON ARTIST

ON MOTION FOR LEAVE TO FILE A CHARGE OF JUDICIAL MISCONDUCT

[August 26 2024]

JUSTICE ST HELIER, concurring in the vacatur of suspension and the appointment of a special master.

I begin by taking issue with the form of the miscellaneous order ("the August 20 order"). I did not "intend[] to file a statement regarding dissent in due course," but instead I intended, in accordance with the normal practice of this Court, to file a statement concurring in part and dissenting in part from the Court's order. A narrow plurality of the Court elected, however, to place me before a most peculiar *fait accompli*. More on that later. *Post*, at 4-5. Happily, because we—correctly, for the reasons that should become apparent—vacate that order today.

I

"The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges," *New York State Bd. of Elections* v. *Torres*, 552 U.S. 196, 212 (2008) (KENNEDY, J., concurring), and they "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority." *Harris* v. *Alabama*, 513 U.S. 504, 519 (1995) (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968)). This is not merely a matter of judicial altruism. As we have explained before, "[t]he power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (KENNEDY, J., concurring)). It was thus that our Framers sought to guarantee "that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke." *United States* v. *Raddatz*, 447 U.S. 667, 704 (1980) (MARSHALL, J., dissenting). *See also* The Federalist No. 78, pp. 469–470 (C. Rossiter ed. 1961) (A.

Hamilton). After all, "[a] timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 65 (1949) (FRANKFURTER, J., concurring).

The other side of that bargain is that "[a] judge, like Caesar's wife, must not only be free of any actual wrongdoing, but his conduct whether in or out of the courtroom must be above suspicion." *Natural Resources, Inc.* v. *Wineberg*, 349 F.2d 685, 691 (CA9 1965) *accord Gray* v. *The Earl of Lauderdale* [1685] Mor 16497 (Scot.) (the "law says, *nemo judex sedeat in causa propria*, and Judges must be like Cæsar's wife, not only chaste, but void of all suspicion, *debent et mentes manusque puras habere*."). Even a reasonable suspicion of misconduct casts a great and sombre shadow over the probity of the entire judicial department of government.

A complaint of judicial misconduct therefore, represents an anomaly in the ordinary course of the exercise of the judicial power. If sustained, it represents a malfeasance of the highest order, a grave abnormality which leaves a dark and scornful stain upon our legal system.

Complainant accuses JUSTICE ARTIST of engaging in political activities, through his involvement in a recent sitting of the Senate, where, according to the video attached to the complaint, Complainee apparently sought to move to discharge business being considered by the Senate. I cannot begin to fathom how or why Complainee, alongside JUSTICE BARRETT, was even admitted to the floor of a sitting legislature, not being a member of it, but to the extent that the original majority, like today's majority granted leave to file a charge of judicial misconduct, I can find no fault. But that is not the question for today, nor does that give the August 20 majority an unremitted carte blanche to satisfy whatever whim takes its fancy.

II

The August 20 majority will not be surprised to learn that I had initially no intention of including a virulent Part like the one to follow in this opinion. Any reader who feels as if his time may be worth more than the cheap paper and ink employed to write it is invited to read ahead to Part III.

A

A charge of judicial misconduct should not be taken lightly. It is a matter best committed to a careful eye and an open mind. I agree that the substance of the charge against Complainee is of a most repulsive kind, since the very "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989).

None of that, however, is a licence to engage in a self-styled process devoid of any legal basis or grounding in reason. The difference

between a judge and a vigilante is that the former binds himself by law, by respect for procedural fairness and by a calm and reflected sense of equity, and that the first and primary agent for his works is none other than the voice of reason itself. That is all the more so in *this* Court and on a question quite as unprecedented as *this* one. The vigilante, meanwhile, cares not for those despicable inconveniences such as "rules", "restraint", "reasons", and "respect." The only language which he speaks is the "strong argument ad hominem couched in the convincing cant" of brutish, unexplained violence. *Cordas* v. *Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199, 201 (City Ct. of N.Y. 1941) (CARLIN, J.). Such actions do not support any likeness of the legitimate working of justice, nor even to civil disobedience. It is little more than mere thuggery. Worse still, it is a thuggery of the most base and uninspired character which serves nothing more than to taint the noble ends which purportedly sees to attach itself to, for such barbarism is inherently unjust. A free-wheeling judiciary, like that proposed by the August 20 majority, is just that—it is no more and no less than mere vigilantism. In fact, it is, I would say, vigilantism of the very worst sort, one which attracts to it the usurped aura of some ersatz justice largely indistinguishable from the quality of that dispensed some half-millennium ago in that great temple of law and justice that was the Court of Star-Chamber.

"*Judicial* decisions are *reasoned* decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution." *Rita* v. *United States*, 551 U.S. 338, 356 (2007) (emphasis added). Since long ago we have explained that judges are to "give[] the reasons on which they rest[] their decisions." *B.&O. R.R.* v. *United States*, 279 U.S. 781, 787 (1929) (collecting cases[1]). That is hardly novel or surprising, since our oath admonishes us to "[1] administer justice without respect to persons, and do equal right" to all manner of men, "[2] faithfully and impartially … [3] under the Constitution and laws of the United States." 28 U.S.C. § 453.

I do not suspect that the August 20 majority elected to burden itself at all with such luxurious extravagances as doing justice or giving reasons. To my mind the August 20 majority, in its pursuit of its ideal of immediately disavowing unethical conduct, without the benefit of any form of inquiry or adversarial testing, does precisely none of those, preferring haste over any real pursuit of justice. It does not even pause to reflect upon the proper course of action, or give any reasons for its decision, a step which, if the August 20 majority is convinced that it is correct in law, and I fear it is not, *post* at 6-18, it should have no difficulties doing. Instead, it suspends a brother justice with nothing more than its bare *imperium* and not so much as an explanation.

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[1] Even back then there were plenty to collect.

I understand the primal urge to act hastily in pursuit of performance and popularity, or out of fear, retribution and anger. Alas, to the August 20 majority's evident ignorance, those instances did not, I am afraid to say, get us very far insofar as regards the advancement of justice, *see e.g. Korematsu* v. *United States*, 323 U.S. 214 (1944). Indeed it is our duty as judges not to cave into those unrefined, base, instincts but to constrain ourselves to more exalted and dignified thoughts. The "enforcement of the law by lawless means . . . goes beyond" merely punishing the author of clearly objectionable misdeeds. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 n.19 (1980) (BRENNAN, J., concurring) (quoting *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (FRANKFURTER, J., concurring in result)). More than that, there is a higher, "transcend[ant]" principle of "[p]ublic confidence in the *fair* and *honorable* administration of justice." *Id*. (emphasis added).

B

What's more, the August 20 majority entirely shunned the basic workings of this Court in pursuit of its ends. I need hardly explain that collegiality lies at the heart of this Court. We "'have a common interest, as members of the judiciary, in getting the law right,' and who, 'as a result, ... are willing to *listen, persuade, and be persuaded, all in an atmosphere of civility and respect*.'" *In re Kendall,* 712 F.3d 814, 833 (CA3 2013) (quoting Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L.Rev. 1639, 1645 (2003)). But "why bother?", the August 20 majority says in not quite as many words when it proceeds knowingly in the few hours in which its dissenting brother's back is turned.

The trouble for the August 20 majority is that "the Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 246 (2016) (ROBERTS, C.J., dissenting) (quoting *INS* v. *Chadha*, 462 U.S. 919, 961, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (POWELL, J., concurring in judgment)) (cleaned up). And so that is precisely why they created in the judiciary an environment in which those who so choose may be insulated from the pressures of popularity and majoritarianism. What's more, they understood from the outset that no man, however learned and however upright, could be an infallible judge, and so they instilled a collegiate court.

To do whatever a majority can be found to do, and to do it only because one can, not because one is confident in its rightfulness, is the epitome of the worst dangers of a cynical, demagogical, and unrestrained political government. It runs deeply contrary to the spirit of justice which this Court exists to uphold.

Quite to the contrary, even when a majority in favour of a certain disposition prevails, the collegiate spirit of the Court commands respect, though not agreement, for any potential dissenters. After all, "[t]he right of a Justice to dissent from an action of the Court is historic. Of course, self-restraint should guide the expression of dissent. But dissent is essential to an effective judiciary in a democratic society, and especially for a tribunal exercising the powers of this Court." *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 528 (1957) (FRANKFURTER, J., dissenting). It is, of itself, a check against a court that may inhabit a realm where there lies an entire and contemptuous disregard for the peculiar and cumbersome theory that we know of as "law". Judicial dialogue, between the judges of the same court, and between the judges of different courts, promotes the ultimate advancement of justice far greater than a single, curt and unreasoned order ever can. *See* Melvin Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*, Pantheon Books (2015); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn L. Rev. 1 (2010); William J. Brennan, *In Defense of Dissents* 37 Hastings L. J. 427 (1985); Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 Fla. L. Rev. 394 (1952); Edward M. Gaffney Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 Val. U. L. Rev. 583 (1994).

This Court is not a political institution. It does not exhibit values by flamboyant but ill-conceived and unfounded decision-making. Instead, it reaches its decisions by a deliberate process combining its learned understanding of the law and reason. Doing otherwise fundamentally misconceives the very role of the judiciary.

C

Lastly, I cannot help but suspect that the cruel irony of the August 20 majority's mindless desire for expeditiousness, and not justice, does not end there, as it unwittingly plays in rather well to political, and not judicial, interests more broadly.

Rashness, spectacle, and dogma each bear the hallmarks of politics of the lowest form, not justice. *Audiatur et altera pars*, our law says, not "jump first and think second". As "a nation where the rule of law prevails, … ends do not justify inappropriate means," *Collazo* v. *Estelle*, 940 F.2d 411, 419 (CA9 1991), and "[l]ofty aims do not justify every step intended to achieve them." *Powers* v. *Ohio*, 499 U.S. 400, 431 (1991) (SCALIA, J., dissenting).

As I have said, the judicial department of government is not elected. It does not dispose of itself of the public force, nor the popular representation, and it is a "central principle of a free society that courts have finite bounds of authority." *Catholic Conf.* v. *Abortion Rights Mobilization*, 487 U.S. 72, 77 (1988). We "do not possess a

roving commission" to do whatever on earth we may fancy. *TransUnion LLC* v. *Ramirez*, 594 U.S. —, 141 S.Ct. 2190, 2203 (2021). We are not bound to do what is popular, but what is, in accordance with law, proper and justified, not to cave into organic, bestial urges of cursory judgment and condemnation. This Court is not a king above law, it is the first and most loyal servant of the law.

The greatest paradox in all of this is that this Court is the foremost loser in this sorry affair. It is the Court whose dignity and consideration are sullied when it casts aside its collegiate practices and adherence to law in favour of uninhibited casuistry. The American citizen's doubts are cast upon the Court which finds itself placed under an ominous cloud of impropriety when it precipitates itself to condemn, under the cover of an entirely unreasoned order, the political activities of a brother justice. It is the Court that drags itself under an ominous cloud of suspicion and distrust when it suspends one of its members, but not another one, equally present at the same juncture, and equally engaged in the activities complained of. It is the Court whose reputation is damaged by the spectacular, zealous, and improper reprobation of one of its members. And it is the Court who abdicates its role not as the influencer of American topical debate, but as a mouthpiece of its law.

The August 20 majority forgets that the special place of our judicial institution within the constitutional framework of our Nation will not guard itself. Ultimately, it is the duty of this Court, not only through its actions, but most importantly through its restraint, to "jealously guard[]" the "independence of the judiciary," *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982), and to protect itself from being corrupted by the sirens of impulsivity and overreach. In doing so, the August 20 majority itself concedes to the irresistible allure of politicised point-scoring and one-upmanship over the law.

III

Unlike my colleagues in the August 20 majority, I wish to address the questions of law surrounding Complainee's suspension, and not merely grandstand upon the moral high ground over Complainee. I suspect goes much too far, and much too eagerly. As I have noted, whilst usually quite sympathetic bedfellows, by their very nature, judicial complaints inherently create tension between a judge's independence and his probity. *Ante*, at 2. Unfortunately, that fact appears to have entirely escaped the August 20 majority in its decision-making.

A

Begin with some common ground.

The difficulty does not lie in whether this Court can, as a disciplinary sanction, namely after full disciplinary hearing and

inquiry, impose a reasonable period of suspension unto a judge, or, for that matter, justice, of the United States, or to suspend him until Congress will have been able to proceed with his impeachment if that is the recommended outcome. Even assuming without deciding *arguendo* that we do not, the question of whether this Court can impose an *interim* suspension before this Court will have been able to fully understand and decide the merits of a case, is not at all the same kettle of fish.

I also do not find it difficult to suggest that, taking the allegations contained within the motion for leave to file the charge of judicial misconduct, and the video attached to the complaint, which we would properly consider at the threshold stage in normal judicial proceedings, *see e.g. Tellabs* v. *Makor Issues Rights*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *In re a Charge of Judicial Misconduct Against Judge Dalton*, 17 U.S. ___ (2024) (Statement of ST HELIER, J.) (applying general sufficiency-of-pleading standard to a judicial complaint), as true, that we ought to grant leave to investigate and hear the charge of judicial misconduct.

I part ways with the August 20 majority, however, when it comes to the interim suspension that they have sought to adopt.

B

We, and other courts, have consistently agreed that complainees are entitled to the protection of due process of law in disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544 (1968) (attorneys entitled to due process in disciplinary proceedings); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) (tenured employees); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (prisoners). I am not surprised that no court I know of has held otherwise in a judicial discipline context. *See Inquiry into Karasov*, 805 N.W.2d 255, 270 (Minn. 2011) ("[A] judge is guaranteed due process of law in a disciplinary investigation and hearing.") (quoting *In re Kirby*, 354 N.W.2d 410, 415 (Minn.1984)); *In re Diaz*, 908 So. 2d 334, 339 (Fla. 2005) ("Although … disciplinary proceedings are not criminal proceedings, we nevertheless have concluded that all judges subject to discipline must be afforded both substantive and procedural due process.") (citing *In re Inquiry Concerning a Judge*, 357 So.2d 172, 181 (Fla. 1978)); *Carroll* v. *Comm. on Judicial Conduct*, 215 Ariz. 382, 384 (Ariz. 2007) ("[A] judge … is entitled to due process in connection with disciplinary proceedings."); *Whitehead* v. *Comm'n on Jud. Discipline*, 111 Nev. 70, 257 (Nev. 1995) ("Of course, due process requirements apply to judicial disciplinary proceedings.").

It is not particularly easy to see why the August 20 majority acts as if this is a novel theory of law. This conclusion sits consistently with all of our prior authorities. Article III judges like Complainee are undeniably vested with tenure. Once a judge has taken such a tenured office, "[t]he right to due process 'is conferred, not by … grace, but by constitutional guarantee." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (POWELL, J., concurring)), and a judge may not be relieved of "such an interest, once conferred, without appropriate procedural safeguards." *Id.*

Having established an entitled to constitutional due process, the next step is for us to determine what level and extent of due process should be accorded to Complainee. "[D]ue process … is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert* v. *Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)). Instead, it is a pragmatic right whose extensiveness lies on a spectrum built upon natural conceptions of fair play and equity in light of each context. The critical variables will usually be the importance of the interest protected, and the potential severity of the outcome.

We have previously held that an attorney discipline proceeding constitutes "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968). Judicial disciplinary proceedings are not altogether different. *See e.g. In re Merlo*, 58 A.3d 1, 8 (Pa. 2012) ("Judicial conduct proceedings are considered quasi-criminal in nature, and, therefore, the defendant is afforded the same constitutional rights as are criminal defendants.") (citing *In re Berkhimer*, 593 Pa. 366, 930 A.2d 1255, 1258 (2007)). As the name suggests, falling just short of full criminal proceedings, "quasi-criminal" contexts require especially heightened protections, on a par with those of criminal prosecutions in many, if not most respects. It is easy to see why attorney and judicial discipline could fall into this category. Like a criminal proceeding, "are specifically designed to exact punishment in excess of actual [reparations] to make clear that the defendant's misconduct was especially reprehensible," *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 54 (1991), and a heightened stigma, just like in criminal proceedings. *See e.g. In re Miller*, 178 N.E.3d 1194, 1196 (Ind. 2022) ("A sanction for judicial misconduct 'must be designed to discourage others from engaging in similar misconduct and to assure the public that judicial misconduct will not be condoned.'") (quoting *In re Hawkins*, 902 N.E.2d 231, 244 (Ind. 2009)). Likewise, judicial and bar disciplinary proceedings also serve, like criminal proceedings, and other quasi-criminal ones, an important role of public protection

against unethical lawyers and judges who present undoubtedly a grave danger to society. To my mind, the primordiality of judicial probity and judicial independence do nothing to detract from the importance of a heightened procedural standard—much to the contrary, both can only be maintained if the tenure and service of judges

Thus, in quasi-criminal such as these, the alleged wrongdoer is entitled, putting the point at the very least, to substantially similar protections as would be afforded to him in an ordinary trial, except the most egregiously cumbersome, such as any potential right to trial by jury, or against self-incrimination. *Boyd* v. *United States*, 116 U.S. 616 (1886) (right against self-incrimination in quasi-criminal forfeiture proceedings). He is also entitled to be presumed to be cleared any wrongdoing and enjoys the benefit of a heightened clear and convincing evidence factual standard. *See Addington* v. *Texas*, 441 U.S. 418 (1979) (clear and convincing evidence required in quasi-criminal proceedings of civil commitment). And he is of course entitled to basic procedural rights such as that of being entitled to notice and to give a full defence, to challenge the evidence, introduce his own, and within reason, obtain information and call witnesses under oath. *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

C

The August 20 majority is mistaken when it characterises my objections to the suspension power as being total and absolute. In doing so, it overestimates the extent of my misgivings, or, perhaps more accurately, underestimates the truly awesome breadth and arbitrariness of its decision.

Although the August 20 majority, no doubt confident in the psychic talents of the American citizenry, did not deign to commit to paper any of the reasons for its order, my conversations with the August 20 majority do reveal thankfully *some* logic to its folly, albeit scant. The August 20 majority relies principally upon *In re a Charge of Judicial Misconduct against Judge Shapiro*, 10 U.S. 5 (nUSA 2020), which it claims stands for the proposition that a judge may be suspended pending investigation, hearing and disposition of the judicial complaint. I am not altogether sure that it does, however.

The question before the *Shapiro* Court was whether, in a case where "punishment is warranted", but "expulsion would be too extreme", "a reasonable suspension is a constitutionally legitimate form of punishment." *Id.* at 13. In deciding that question, the *Shapiro* Court found "that the power to suspend is an implied *adjunct* of our expulsion power." *Id.* at 12 (internal quotation marks omitted) (emphasis in original). What it may have had to say about an *interim* suspension, however, is pure *obiter* then, "something mentioned in

passing, which [was] not in any way necessary to the decision of the issue before the Court," *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 443 (1987), and which accordingly "settles nothing, even in the court that utters it." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 352 n.12 (2005). For the reasons I have set out, however, suspension as post-adjudication punishment and suspension as an interim measure are two wholly different things. *Post* at 12. What's more, even if the August 20 majority correctly relies on *Shapiro*, I am not sure that *Shapiro* does it any great service. As I have observed, we held in *Shapiro* that suspension is an adjunct of the power to expel. Yet that power to expel is necessarily conditioned on the vote of a supermajority of "two thirds of *the Court*." U.S. Const. Amend. XVII (emphasis added). "The Court", unlike what the August 20 majority claims, certainly does not mean a carefully curated sub-panel of the Court. It should not be particularly contentious that when faced with a constitutional question, our guiding light is a good-faith and common-sense reading of the plain text of the Constitution itself. *Terry* v. *Adams*, 345 U.S. 461, 469 n.3 (1953) ("We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.") (quoting *Ex parte Siebold*, 100 U.S. 371, 393 (1879)); *Lake County* v. *Rollins*, 130 U.S. 662, 670 (1889) ("The object of [constitutional] construction … is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts … are not at liberty to search for its meaning beyond the instrument."). A fair understanding of the Seventeenth Amendment roundly discredits the August 20 majority's theory. This Court does not, as a matter of practice, sit in sub-panels or subdivisions in disciplinary cases. It did not do so at the time of the passing of the Seventeenth Amendment. When our Framers referred to the Court, they inevitably referred to its whole, and not some. informal, arbitrary part of it, as the August 20 majority claims. So too, do fundamental notions of workability and common sense. Indeed, if one follows the August 20 majority's train of thought, a complainant seeking to abuse the expulsion power need do no more than find one single sympathetic justice, name in the same complaint all of the justices of the Court, demand their recusal, and secure a "unanimous" decree of this Court expelling all six recused justices. In fact, if one carries through the August 20 majority's argument to its logical completion, the Court is *always* unanimous at the very instant the first justice votes or takes a view on any issue. That first justice,

according to the August 20 majority's logic, is entitled to dispose of a case however he wishes. Alas, I am afraid to tell the August 20 majority that its interpretation of the Seventeenth Amendment is the law according to Lewis Carroll. It is viscerally antipodal to any conception of justice known to civilised law and fundamentally incompatible with the very objection of the Seventeenth Amendment, namely to defend the probity of the judiciary.

More fundamentally, I do not object necessarily to employing a suspension as an interlocutory measure. Even accepting *arguendo Shapiro* on its face as the August 20 majority suggests, an interlocutory suspension is not a matter of course, nor available without conditions or limits. Our past practice strongly indicates that suspension is never ordinary or automatic. *See e.g. In re a Charge of Judicial Misconduct Against Judge Fletcher*, 10 U.S.—, 10D20 (2020) (no interlocutory suspension); *In re a Charge of Judicial Misconduct Against Judge Dalton*, 17 U.S. ___, 17D3 (2024) (same); *In re a Charge of Judicial Misconduct Against Judge Derogatoryy*, 17 U.S.—, 17D3 (same). Of course, the mere possibility of admin abuse by access to permissions alone cannot account for the entire story, *see In re a Charge of Judicial Misconduct Against Chief Judge NewPlayerqwerty*, 15 U.S.—, 15D4 (2023) (no suspension of a chief judge). *In re a Charge of Judicial Misconduct Against Chief Judge Convext*, 11 U.S.—, 11D16 (2021) (no suspension of a chief judge accused of running for elected office while sitting on the bench). Nor is there even evidence of interlocutory suspension being commonplace where the misconduct is severe, *see In re a Charge of Judicial Misconduct Against Judge Tact*, 15 U.S.—, 15D3 (2023) (no interlocutory suspension despite an eventual sanction of two weeks' suspension).

I am not surprised to discover that our own jurisprudence reflects sagely a moral of caution and restraint. Interlocutory suspensions are drastic remedies which, even if imposed upon a judicial officer ultimately cleared of misconduct, may leave a lasting cloud of doubt over his probity and legitimacy which is ultimately harmful not only to him, but to the whole judiciary. Moreover, we must be all the more cautious since "'[i]n the real world', the lure of these means of attacking a judge or his qualifications personally are too hard to resist, and "are sometimes driven more by litigation strategies than by ethical concerns." *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1360 (CA8 1996) (quoting *In re Cargill*, Inc., 66 F.3d 1256, 1262-63 (CA1 1995)). A low, unquestioning, bar, or worse, suspension as a matter of course, even curtailed to certain kinds of misconduct, is decidedly unworkable—in effect it would give losing litigants and other dissatisfied citizens a virtually unlimited veto against judges with whom they take objection, by being able to obtain, even if only for a couple of weeks while disciplinary

proceedings are ongoing, an *ex parte* suspension obtained by dint of broad accusations and limited, decontextualised evidence.

D

The conditions for their issuance are, however, wholly different to those of a disciplinary post-adjudication sanction like the one that was before us in *Shapiro*. A *Shapiro* suspension, whatever our authority to issue one, is a form of punishment, issued at the end of a fair and deliberated disciplinary process. It is premised upon a finding of misconduct through an adversarial inquest, and is ultimately little different to the award of a punitive civil remedy or the sentencing of a criminal offender. In entering a *Shaprio* suspension, the court or tribunal will have weighed up the competing factors governing the severity of the sanction to be imposed, such as the protection of the judiciary and the public against unethical judges, the reprehensibility of the misconduct and the need for punishment, and the deterrence of other misconduct, and of course, the severity and nature of any punishment ought to be tailored to suit the needs of every case. *Cf. Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 355 (1871) ("A removal from the bar should therefore never be decreed where any punishment less severe — such as reprimand, temporary suspension, or fine — would accomplish the end desired."). In other words, a *Shapiro* suspension is the outcome of a quasi-judicial disciplinary process which affords due process rights. An interlocutory suspension, and a fortiori an *ex parte* interlocutory suspension, is different. Complainee has not had the benefit of *any* meaningful protection. He is entitled to be presumed to be clear of any wrongdoing, unless the disciplinary inquest to follow shall have produced clear and convincing evidence of that wrongdoing. Instead, the August 20 majority has deliberated in haste and in secret, on the strength only of what was submitted to it by Complainant. It did not even *consider* the eventuality of there being another side to the story, or context that might be absent. Whilst I agree that a *prima facie* case, on the strength only of what is provided by Complainant rightly entitled to absolute truth, has been established, that is not and has never been, the standard required for interlocutory measures as drastic as a suspension to be imposed, whether in a criminal or civil context. In each instance, our law requires, beyond merely the *prima facie* showing of a certain form of conduct, specific factors which warrant interim measures. What's more, in each example, the subject of those interim measures is entitled to a preliminary adversarial hearing and inquiry before those measures are imposed, something wholly absent from the August 20 majority's expansive and ungrounded understanding of *Shapiro*, which runs contrary to every iota of our jurisprudence.

That being said, I do not claim to argue that there are entirely *no* conditions in which an interlocutory suspension will be warranted.

So what, then, ought to be the standard for issuing an interim suspension in a judicial discipline proceeding? We can take inspiration from the well-known standards applied in our ordinary civil and criminal jurisprudence. Indeed, like a preliminary injunction, a suspension "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981).

I think it fair to suggest that as a drastic and cumbersome measure, interlocutory suspension should be no more than "the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). It should be available, like a preliminary injunction, only as an "extraordinary" power that should be exercised sparingly, "upon a clear showing", *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997)). It is normally only available *inter partes*, not *ex parte*, *post* at 16-17, and it is only available upon a showing of "a compelling reason" in a "narrow" class of circumstances. *Demore* v. *Kim*, 538 U.S. 510, 550 (2003) (SOUTER, J., concurring)

To my mind that showing is only made where several factors are satisfied. First, and as a threshold matter, the complaint must actually allege reviewable misconduct, and it must allege misconduct that is of such a nature that, on the strength of those well-pleaded allegations, namely those that "contain sufficient factual matter, accepted as true, to state a[n allegation of judicial misconduct] that is plausible on its face," *Wood* v. *Moss*, 572 U. S. 744, 757-58 (2014) (citing *Ashcroft* v. *Iqbal*, 556 U. S. 662, 578 (2009)), it is a distinct likelihood that the complainee would at least be suspended for as long as the likely or ordinary duration of disciplinary proceedings, if not reported to Congress for impeachment or expelled—after all it would be most absurd for a judge to be suspended pending inquiry if, even if the Court were to find against him on the very day the complaint were filed, he would have been, as a practical matter, suspended for significantly less time than that required to hold proceedings on the complaint. Second, if a complaint clears that first hurdle, he must next demonstrate those two primary factors we traditionally consider when considering whether to grant interlocutory relief, which are namely "'(1) whether [the complainant] has made a strong showing that [it] is likely to succeed on the merits'" and "'(2) whether the[re] will be irreparably injured absent a stay.'" *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (quoting *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)) (second alteration in original). Lastly, if each of those factors are clearly present we then try "to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Int'l*

Refugee Assistance Project, 137 S. Ct. at 2087 (quoting *Barnes* v. *E–Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (SCALIA, J., in chambers)) (alterations in original). Only then *could* an interlocutory suspension issue, assuming that "sound equitable discretion" does not "weigh[] against it" *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1305 (2010) (quoting *Barnes*, 501 U.S., at 1305), and I stress that such interlocutory relief should never "follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits," *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1943-44 (2018), nor is it "a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 427 (quoting *Virginian R. Co.* v. *United States*, 272 U.S. 658, 672 (1926)).

It should be apparent that the burden is not carried here, but it seems to me expedient, for the sake of completeness, to make a demonstration of the proper application of such a standard.

Beginning with the first step, I have noted that the complaint and accompanying video does make the requisite showing of a plausible charge of misconduct. *Ante*, at 7. I am not at all sure on the other hand whether, although his comportment would, if true, be likely to give rise to disciplinary sanction of the severity required. As the *Shapiro* court itself noted, removal is a most "extreme option." 10 U.S., at 10. To my mind, expulsion, as opposed to a recommendation of impeachment, is only available when the complainee judge is banned on moderation grounds from the United States for a severe offence, or, alternatively, in clear-cut cases of egregious misconduct, almost invariably resulting from the abuse of the privileges of his office as a judge. Although Complainee's conduct, assumed as true, is plainly contrary to the proper conduct of judges, of which Complainee, as a learned justice, ought to have been aware, it does not appear on the face of the record as if at any point during his misconduct he claimed to act under the colour of judicial authority or by virtue of the privileges of his office, and it appears to me as if the political conduct impugned was of a momentary nature, at the instigation of another. That is certainly no exculpatory argument, especially given that the substance of the allegation is that Complainee made a procedural motion on the floor of the hemicycle during congressional proceedings, but it is to my mind reasonable mitigation as to the severity of the sanction that would be imposed. I am ultimately not satisfied that Complainee's misconduct was any more grave or reprehensible than that in *Shapiro*, which occasioned an approximately ten-day suspension. If anything, Judge Shapiro's conduct was both considerably more reprehensible and considerably better proven and investigated than Complainee's. Shapiro deliberately created an alternate account in order to practice before his own court. Next, upon

learning of the proceedings, Shapiro took steps to cause the evidence against him to be deleted, *Ibid*., at 6-7. Lastly, while I note that Shapiro strenuously denied his involvement in it, and accept that at face value without deciding, legislators with whom he was regularly in contact took steps to introduce legislation to exonerate Shapiro. Moreover, the suspension relied not on the complaint of a single private complainant either. Instead, both a congressional subcommittee[2] and most of the judges of the District Court[3], had inquired into the conduct of Judge Shapiro, conduct with which Shapiro had been confronted and which he was able to challenge, but voluntarily chose not to, before being suspended. That is to say that if even the *Shapiro* Court felt that removal by impeachment or expulsion might have been a step too far, then I fail to see how the same would not apply to Complainee. Even assuming an approximately equivalent duration of suspension, which I think already to exceed the sanction that would be appropriate on the face of the well-pleaded allegations, I do not think it is difficult to suggest that Complainee's disciplinary proceedings are likely to last longer than the ten days' suspension we issued in *Shapiro*. Indeed, the August 20 majority's order itself allots seven days for Complainee to file an initial answer to the complaint, after which both Complainant and Complainee are in my view likely to wish to introduce and obtain evidence. In fact, I can hardly see how the proceedings against Complainee could be concluded in that time.

Even if one concedes *arguendo* that the shaky showing on the threshold question is met, there is more still. At step two, we ought to evaluate separately the likelihood of success on the merits and the likelihood of irreparable harm. Of course, the Court can hardly examine those factors *ex parte*, since Complainant's allegations are no longer entitled to a general presumption of truth as at the threshold stage. Ultimately, sound judicial prudence counsels against opining on the likelihood of factual success on the merits on the strength of Complainant's unquestioned allegations alone, and in any event, *no* showing whatsoever is made here that irreparable harm will be occasioned here, nor that it would be redressable by a suspension.

Moving onto the equitable prong of the suspension, this too weighs against the grant of a suspension. Several key factors inform our equitable discretion at the third step. Begin with the harm to Complainee. Unsurprisingly, the likelihood of the subject of an interlocutory suspension suffering severe harm will tend to tip the balance of the equities *away* from the grant of an interlocutory measure. Here, it is clear that he will suffer not insignificant harm

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[2] https://drive.google.com/file/d/1dXBfzGfYbQypmDUXSGgJMVI2SV8x-_JM/view?usp=sharing

[3] https://docs.google.com/document/d/1AtvKispZ8buaYuQdZFOwYk8vkeBc3Cov2sblmSUnZNY/edit?usp=sharing

should the suspension be granted, for not only would Complainee suffer reputational harms caused by the suspension, he will be irreversibly prevented from proceeding in cases in which he would otherwise quite properly be able to had he not been suspended.

The balance of the equities is not merely reducible to the harm to the nonmovant, however. When doing so, the Court may properly draw reasonably inferences as to the diligence and motive. *Cf. Benisek*, 138 S. Ct., at 1944 ("[A] party requesting a preliminary injunction must generally show reasonable diligence."). The complaint was docketed almost two days before the August 20 majority issued its order. Complainee was clearly aware of the complaint almost immediately after its docketing. Throughout the first twenty-four hours of its life in this Court, the complaint, while concerning, clearly did not warrant the truly peculiar exigency it enjoyed in the few hours leading up to the issuance of the order, ignoring any preparations relating to the appointment of a special master, *post*, at 16-17, and charging ahead with nothing more than disdain for the dissent. Then there is the public interest. While the nature of these proceedings would appear to dictate naturally that we accord a primordial importance to this prong of equitable analysis, where the public interest lies is almost invariably by its nature indeterminate, that is to say that it lies most obviously against unlawful conduct, but firmly in favour of protecting the independence of judges whose conduct is satisfactory. The public interest is not served by chilling judicial independence with the knowledge that a hastily decided suspension, with little relationship to the merits of the complaint, awaits judges who are reported as having committed judicial misconduct. *Pulliam* v. *Allen*, 466 U.S. 522, 532 (1984) ("It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.") (quoting *Bradley*, 80 U.S. (13 Wall.), at 350 n.‡ (1872)). The trouble with the August 20 majority's rash *ex parte* order, is however simple. As I have already observed, the public interest is not in any way served by an unbridled Court which acts without the benefit of legal syllogism or adversarial testing.

Lastly, and critically, an interlocutory suspension should not normally issue *ex parte*. It is, instead by its very nature an *inter partes* order. While I agree that considerations of sound judicial administration mean we may properly raise the question of, and invite appropriate submissions on, an interlocutory suspension *sua sponte*, *cf. In re Haven*, 7 U.S. 42, 44 (nUSA 2019) (noting that expulsion is a power that can be invoked *sua sponte*); *Chambers* v. *Nasco, Inc.*, 501 U.S. 32 (1991) (inherent power invocable *sua sponte* of courts to sanction misconduct of attorneys at its bar), even so, like

a preliminary injunction, save in the most singular subset of the exceptional class of cases in which an interlocutory suspension will be appropriate at all, an interlocutory suspension will not issue *ex parte*, *see e.g. Hope* v. *Warden York Cnty. Prison*, 972 F.3d 310, 320-21 (CA3 2020), and even then only so as to allow an *inter partes* interlocutory hearing, since "our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc.* v. *Teamsters*, 415 U.S. 423, 439 (1974). To that end, I accept without deciding that there may be a narrow subset of suspensions where a 'preliminary suspension to the preliminary suspension itself' may be necessary in order to curtail "the risk of an admin attack or other interim abuse of power by the judge under investigation." *Shapiro*, 10 U.S., at 10. Even conceding *arguendo* that there is a place in our jurisprudence for such a measure, the burden is not met, however, whenever a complainant or the Court invokes the magic words of "admin abuse". To my mind, this even more extreme and demanding standard is only necessary and met upon a highly specific, evidence-supported showing that, on top of there being made a strong showing on all of the general suspension factors I have just recalled, a complainee would be [1] likely to *actually* partake, and not merely that he would be *able* to partake or that he might *hypothetically* partake, in some sort of severe and utterly irreversible act, so severe that even a hearing could not be held, a narrow category which in practice is constrained to 'computer crime' of various descriptions, such as severe vandalism of the Court's computer technology systems, or the involuntary and unlawful divulgation of real-life personal information regarding judges, court staff or third parties; and [2] that the Court is likely able, as a practical matter, to actually prevent such an offence through its *ex parte* order—however appropriate the order may be under the first prong, it remains wholly improper if it is clear that it would nevertheless be futile. Of course, the recurring theme here is that the August 20 majority does not as a matter of fact make that showing when it comes to Complainee. Firstly, apart from noting that Complainee is technically *able* to wreak havoc with this and other courts' technological systems, the August 20 majority is unable to demonstrate any actual likelihood of Complainee doing so. Indeed, at the point in time at which the August 20 majority's suspension issued, Complainee had already been aware of the proceedings against him for two days. Had he wanted to vandalise the Court's technology systems, he would likely already have done so. Secondly, the August 20 majority does not demonstrate how its order is actually able to prevent such harm, given that Complainee already has wide-ranging access to various electronic systems of great importance to the United States, and that there is no real likelihood of the

August 20 majority being able to curtail that access in any significant way.

E

Lastly, the question, as a practical matter, of how this Court will handle the fact-finding of this particular proceeding merits some thought. In fact, before the August 20 majority abruptly elected to proceed with its order, the Court had investigated the appropriateness of Special Master candidates, and especially district judge and former Chief Justice Leroux.

To the August 20 majority's apparent disbelief, we often will appoint special masters to handle factual disputes, *see e.g. Maryland* v. *Louisiana*, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit."), since, surprisingly no doubt for the August 20 majority, "[a]ppellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 552 n.3 (1984); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 463 (1992) ("It has become our practice in original jurisdiction cases to require preliminary proceedings before a special master, to evaluate the facts and sharpen the issues.") (SCALIA, J., dissenting). Other courts have done likewise. *See e.g. Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020) ("Given the extensive and varied nature of the plaintiffs' injuries, the court [below] appointed seven Special Masters to aid its factfinding."). Such special masters may either be "judges or members of the Bar", and they are tasked with "'tak[ing] such evidence as may be . . . necessary' [to] 'find[ing] the facts" of a given case before us. *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980) (quoting *Nebraska* v. *Iowa*, 379 U.S. 996 (1965); *Mississippi* v. *Louisiana*, 346 U.S. 862 (1953)).

Furthermore, the fact that, as the August 20 majority appears to have implied, Complainee's reported conduct is merely the tip of the iceberg, is of particular gravity, or requires celerity of hearing only tip the balance further in *favour* of appointing a special master. By sitting alone and subject to fewer of the ardours of a judicial procedure oriented towards hearing appeals on a question of law, however, and subject to our quasi-appellate review of objections to his recommendations, a special master is able to conduct factual inquiry much more switfly and effectively than this Court could ever hope to do without such assistance.

I agree with the August 20 majority that diligent inquiry into plausible accusations of misconduct is not only desirable but a basic necessity of an ethical and orderly judiciary. The facts before the Court as contained in the complaint are undoubtedly incomplete. It is undeniably for this Court to ascertain whether what it has seen is the tip of the iceberg or nothing more than a piece of flotsam. That said, I

for one am particularly concerned, that, the August 20 majority having made its courageous pronouncement, and emancipated itself of the need to make any taxing employment of its intellect, any meaningful inquest on these undeniably serious allegations of judicial misconduct will fall entirely by the wayside without the appointment of a Special Master. Apart from exposing a brother justice to opprobrium, I am not quite sure what that will achieve in furthering the genuine and legitimate aims of a disciplinary complaint.

* * *

The question before the Court today has become no longer one "merely", if one could forgive the turn of phrase, of the misconduct of Complainee. It relates to a fundamental misconception, earnest no doubt, of the very mission of the judiciary. I accept that legitimate, deeply held, opinions may differ when it comes to the availability of an interim suspension. There ought, however, to be none when it comes to the fundamental functioning of the judiciary.

Because "we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly." *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965). The original majority, which ironically was not even a majority of the Court but a mere plurality of three, elected to shun that cautionary admonition in favour of fashioning its own farce and mockery of justice. And in doing so, it forgot that "to perform its high function … 'justice must satisfy the appearance of justice.'" *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

The most striking part is that the original majority achieved all of that in a case in which it sternly admonishes one of our brother justices for overstepping his role as a judicial officer.

Today, the Court rights its previous injustice. I most vigorously concur.

SUPREME COURT OF THE UNITED STATES

No. 17-07

IN RE TONY GIORDANO

ON A PETITION FOR A WRIT OF MANDAMUS

[August 26 2024]

The petition for a writ of mandamus is denied.

Statement of JUSTICE ST HELIER, respecting the denial of mandamus.

Petitioner is the former Chief Justice of this Court, who was recently removed from that office after conviction by the Senate in impeachment proceedings. He seeks to challenge those proceedings of impeachment and his ultimate conviction by writ of mandamus before this Court.

We do not need to, and should not, reach the merits of that claim today, and even less question the judgment of the Senate in removing Petitioner, since it is a truism to recall that we are "a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 610 (2013) (quoting *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 37-38 (2012)). Our original, properly judicial, jurisdiction extends only to "controversies between two or more States … proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties … controversies between the United States and a State … actions or proceedings by a State against the citizens of another State or against aliens." 28 U.S.C. § 1251. *See also* U.S. Const. Art. III § 2. And of course contrary to the jurisdictional statement filed by Petitioner, "the All Writs Act and the extraordinary relief the statute authorizes are *not* a source of subject-matter jurisdiction." *United States v. Denedo*, 556 U.S. 904, 913 (2009) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)) (emphasis added).

What's more, even where a claim enters theoretically within our original jurisdiction, it is usually imprudent to hear it. It is horn-book law for the practitioners and members of this Court that our "original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute,'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)), meaning that this Court should and must, even assuming *arguendo* that the claim entered within our original jurisdiction, "make case-by-case judgments as to the practical necessity of an original forum in this Court." *Id.* (quoting *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)). Our own precedents

indicate that we accordingly refrain, save the most exceptional circumstances which are not present here, from exercising original jurisdiction when the plaintiff or petition "has another adequate forum in which to settle his claim," *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981) (quoting *United States v. Nevada*, 412 U.S. 534, 538 (1973)), yet United States district courts of competent venue and personal jurisdiction undoubtedly *do* have original jurisdiction to hear proceedings in the nature of mandamus against an officer of the United States. 28 U.S.C. § 1361. Likewise, to the extent that Petitioner relies on Sup. Ct. R. 20(1)(3)(a) in relation to mandamus to a lower court to invoke jurisdiction, he is misguided, since "mandamus to an [executive branch] officer is said to be the exercise of original jurisdiction, but a mandamus to an inferior court of the United States is in the nature of *appellate* jurisdiction." *Ex Parte Crane*, 30 U.S. 190 (1831) (emphasis added).

To be sure, it is undoubted that Petitioner's claim substantively presents important questions of law which is more than deserving of this Court's attention at the proper juncture. We will have to, at some point, return to the question of impeachment, sooner—upon appeal or certiorari from an order granting or denying interlocutory relief—or later—on the merits case. I am not left with much of an inkling of doubt that in light of this Court's past precedents and the circumstances of the case that Petitioner likely presents a "certworthy" case when the time comes, for it moreover raises serious tension between and among our own precedents. *Compare Nixon v. United States*, 506 U.S. 224 (1993) *with Reset v. United States*, 9 U.S. 1 (nUSA 2020). Whilst I am to my mind dubious as to whether the court below is at all bound by decisions emanating out of that constitutional anomaly of anytime review, I would not be surprised, given the potentially insoluble tension between *Nixon* and *Reset*, and indeed the questions left open by *Nixon* alone, that the court below will not hesitate to refer this cause back to this Court at some later juncture. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (approving of lower court applying "wobbly [and] moth-eaten" precedent but drawing this Court's attention to it for overruling). Indeed, it appears curious at the very least that one reading of our precedents recognises a judicially cognisable claim in the inherently Congressional realm, closely akin to that of grand and petit juries, of considering what conduct constitutes an impeachable offence, whilst simultaneously eschewing consideration of any due process protection, that which presents inherently a question of law and which is implicit in every act of government. It seems to be a most intriguing peculiarity to refuse review of that which is inherently legal on justiciability grounds and to grant it on a matter of pure common sense and political judgment. Those issues, however deserving of this Court's

consideration, are, nonetheless, prematurely brought before this Court, and to that end the only certainty that is to be had at this present juncture is that the District Court ought to proceed with all deliberate speed in resolving any issues at first instance.

Lastly, and independently of the substance of the claims, I am not entirely certain as to whether mandamus relief is the right vehicle to bring such a claim. "The common-law writ of mandamus … is intended to provide a remedy for a plaintiff only if [1] he has exhausted all other avenues of relief and [2] only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976)). Nowadays, it is employed in federal practice almost exclusively as an appellate writ against judges of lower courts. Tellingly, the previous occasion on which an impeachment came before this Court by the normal judicial process, that is to say, otherwise than by anytime review, it started life as an action for a declaratory judgment combined with injunctive relief. *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990). Nonetheless, I do not find that a cause for any great surprise, since a writ of mandamus does no more than compel an officer to perform a ministerial duty. Yet barring trial *de novo*, which is hardly a ministerial duty, Petitioner can point to no duty which Respondent need perform prospectively, and even that is necessarily premised on the vitiation of the *anterior* actions of the Senate. Meanwhile, "[m]andamus is employed to compel the performance, when refused, of a ministerial duty … but not to … *direct the retraction or reversal of action already taken*." *Miguel v. McCarl*, 291 U.S. 442, 451 (1934) (quoting *Wilbur v. United States*, 281 U.S. 206, 218-219 (1930)) (emphasis added) *see also Alejandrino v. Quezon*, 271 U.S. 528 (1926). That too, however, is a matter for the court below upon which I would be loath to opine definitively on today.

Needless to say, because this Court is without original jurisdiction and denies the writ of mandamus, it is not before this Court that ermergency relief should properly be sought and I would deny that too.